

## CHAPTER 10

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### 10.1 GENERALLY

Utah's implied consent statute requires any person who operates a vehicle in the State of Utah to submit to a chemical test to determine alcohol or drug content. Although that person may withdraw the consent, if an officer may seek a warrant to forcibly collect a sample.

Due process requires that peace officer must have reasonable grounds for his belief that the person requested to submit to the chemical test was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs; reasonable grounds exist where the facts and

circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that the situation exists. *Ballard v. State, Motor Vehicle Div.*, 595 P.2d 1302 (Utah 1979).

This section does not require an arrest prior to taking a blood sample, and allows drawing blood from an unconscious person with or without an arrest. *State v. Wight*, 765 P.2d 12 (Utah Ct. App. 1988).

### **10.1.1 ADMINISTRATION OF TEST**

Utah Code Ann. §41-6a-520 provides, in relevant part:

(b) A test or tests authorized under this Subsection (1) must be administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while in violation of any provision under Subsections (1)(a)(i) through (iii).

(c) (i) The peace officer determines which of the tests are administered and how many of them are administered.

(ii) If a peace officer requests more than one test, refusal by a person to take one or more requested tests, even though the person does submit to any other requested test or tests, is a refusal under this section.

(d) (i) A person who has been requested under this section to submit to a chemical test or tests of the person's breath, blood, or urine, or oral fluids may not select the test or tests to be administered.

(ii) The failure or inability of a peace officer to arrange for any specific chemical test is not a defense to taking a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

### **10.1.2 ADDITIONAL TEST**

Utah Code Ann. §41-6a-520 provides, in relevant part:

3) Upon the request of the person who was tested, the results of the test or tests shall be made available to the person.

(4) (a) The person to be tested may, at the person's own expense, have a physician of the person's own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

### **10.1.3 RIGHT TO COUNSEL**

Utah Code Ann. §41-6a-520 provides, in relevant part:

(5) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

## **10.2 IMPLIED CONSENT**

Utah Code Ann §41-6a-520 provides, in part:

### **41-6a-520. Implied consent to chemical tests for alcohol or drug**

(1) (a) A person operating a motor vehicle in this state is considered to have given the person's consent to a chemical test or tests of the person's breath, blood, urine, or oral fluids for the purpose of determining whether the person was operating or in actual physical control of a motor vehicle while:

(i) having a blood or breath alcohol content statutorily prohibited under Section 41-6a-502, 41-6a-530, 53-3-231, or 53-3-232;

(ii) under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6a-502; or

(iii) having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6a-517.

(b) A test or tests authorized under this Subsection (1) must be administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while in violation of any provision under Subsections (1)(a)(i) through (iii).

## 10.3 IMPLIED CONSENT REFUSAL

If a suspect refuses to comply with an officer's request to administer a chemical test, he or she is considered to have refused the test. This carries several sanctions.

### 10.3.1 DEFINITION OF REFUSAL

Although it may seem fairly simple to define "refusal", occasionally grey areas appear. Several circumstances have been reviewed by the Utah appellate courts:

Express verbal refusal is not necessary to withdraw the consent implied by the statute, which is only a fictional consent anyway; a refusal in fact, regardless of the words that accompany it, can be as convincing as an express verbal refusal, and that includes playing verbal games with the officer to avoid a direct refusal. *Beck v. Cox*, 597 P.2d 1335 (Utah 1979).

A refusal simply means that an arrestee who is asked to take a breath test declines to do so of his own volition. Whether or not that refusal is conditional or reasonable makes no difference. *Lopez v. Schwendiman*, 720 P.2d 778 (Utah 1986).

A refusal to answer yes or no to a request to take a breath test is still a refusal. *Lopez v. Schwendiman*, 720 P.2d 778 (Utah 1986).

Plaintiff was clearly informed of the consequences of her failure to submit to the blood alcohol content test under this section and her continued crying throughout the officer's requests and warnings that unless she responded, he would consider that she had refused and that her license could be revoked constituted a voluntary refusal to submit. *Lee v. Schwendiman*, 722 P.2d 766 (Utah 1986).

Driver's conduct was refusal when, although he verbally agreed to tests, he obstructed the process by sticking his tongue over and chewing on the mouthpiece and blowing out the sides of his mouth, thereby preventing officers from obtaining an adequate, viable breath sample. *Cowan v. Schwendiman*, 769 P.2d 280 (Utah Ct. App. 1989).

Motorist's refusal to take blood test until he could call his lawyer constituted refusal under the statute and a valid basis for revocation of his license. *Fjelsted v. Cox*, 611 P.2d 382 (Utah 1980)

### **10.3.2 REFUSAL ADMONITION**

Prior to requesting that a suspect submit to a chemical test must provide a statutory warning to the suspect regarding the consequences of refusing the test:

Utah Code Ann §41-6a-520 provides, in part:

(2) (a) A peace officer requesting a test or tests shall warn a person that refusal to submit to the test or tests may result in revocation of the person's license to operate a motor vehicle, a five or ten-year prohibition of driving with any measurable or detectable amount of alcohol in the person's body depending on the person's prior driving history, and a three-year prohibition of driving without an ignition interlock device if the person:

- (i) has been placed under arrest;
- (ii) has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1); and
- (iii) refuses to submit to any chemical test requested.

The wording generally used by law enforcement agencies in Utah is as follows:

Test results indicating an unlawful amount of alcohol, drug or a controlled substance or its metabolite in your breath/blood/urine in violation of Utah Law, or the presence of alcohol and/or drugs sufficient to render you incapable of safely driving a motor vehicle may, result in denial, suspension, revocation or disqualification of your driving privilege or refusal to issue you a license.

If you refuse the test(s) or fail to follow my instructions the test(s) will not be given. However, I must warn you that your driving privilege may be revoked for 18 months for a first refusal or 24 months for a subsequent refusal with no provision for limited driving. After you have taken the test(s), you will be permitted to have a physician of your own choice administer a test(s) at your own expense, in addition to the one(s) I have requested, so long as it does not delay the test or tests requested by me. I will make the test results available to you, if you take the test(s).

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test(s). You do not have the right to have counsel during the test procedure. Unless you submit to the test(s) I am requesting, I will consider that you have refused to take the test(s). I warn you that if you refuse to take the test(s), your driver's license can be revoked for 18 months with no provision for a limited license.

If, following the admonition and request to submit to a test, the suspect refuses to comply, the officer must do the following:

(b) (i) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered, a peace officer shall, on behalf of the Driver License Division and within 24 hours of the arrest, give notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle.

(ii) When a peace officer gives the notice on behalf of the Driver License Division, the peace officer shall:

(A) take the Utah license certificate or permit, if any, of the operator;

(B) issue a temporary license certificate effective for only 29 days from the date of arrest; and

(C) supply to the operator, in a manner specified by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

(c) A citation issued by a peace officer may, if provided in a manner specified by the Driver License Division, also serve as the temporary license certificate.

(d) As a matter of procedure, the peace officer shall submit a signed report, within ten calendar days after the day on which notice is provided under Subsection (2)(b), that:

- (i) the peace officer had grounds to believe the arrested person was in violation of any provision under Subsections (1)(a)(i) through (iii); and
- (ii) the person had refused to submit to a chemical test or tests under Subsection (1).

### **10.3.3 PERSONS INCAPABLE OF REFUSAL**

Any person who is dead, unconscious, or in any other condition rendering the person incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection 41-6a-520(1), and the test or tests may be administered whether the person has been arrested or not. Utah Code Ann. §41-6a-522.

### **10.3.4 ADMISSIBILITY OF REFUSAL EVIDENCE**

Evidence that a defendant refused to submit to a chemical is admissible at trial and should be presented as evidence which the jury can consider in determining guilt. Additionally, the prosecutor is permitted to argue the relevance and weight of the refusal to the jury.

Utah Code Ann §41-6a-524 provides, in part:

If a person under arrest refuses to submit to a chemical test or tests or any additional test under Section 41-6a-520, evidence of any refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle while:

- (1) under the influence of:
  - (a) alcohol;
  - (b) any drug; or
  - (c) a combination of alcohol and any drug;

- (2) having any measurable controlled substance or metabolite of a controlled substance in the person's body;
- (3) having any measurable or detectable amount of alcohol in the person's body if the person is an alcohol restricted driver as defined under Section 41-6a-529; or
- (4) having any measurable or detectable amount of alcohol in the person's body if the person has been issued a conditional license under Section 53-3-232.

## **10.4 PRESERVATION OF SAMPLE**

Law enforcement agencies are not required by the federal constitution to take a separate breath specimen and preserve that sample for possible use by the defense in attempting to challenge the breath test results. *Layton City v. Watson*, 733 P.2d 499 (Utah 1987).

## **10.5 PERSONS AUTHORIZED TO DRAW BLOOD**

The statute does not allow blood to be drawn by anyone other than a trained professional. These persons are physicians, registered nurses, practical nurses, and phlebotomists. Utah Code Ann. §41-6a-523 reads in relevant part:

Persons authorized to withdraw blood - Immunity from liability.

- (1) (a) Only a physician, registered nurse, practical nurse, or person authorized under Section 26-1-30, acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content.
- (b) The limitation in Subsection (1)(a) does not apply to taking a urine, breath, or oral fluid specimen.

### **10.5.1 IMMUNITY**

- (2) Any physician, registered nurse, practical nurse, or person authorized under Section 26-1-30 who, at the direction of a peace officer, draws a sample of blood from any person whom a peace officer has reason to



believe is driving in violation of this chapter, or hospital or medical facility at which the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

## **10.6 WARRANT FOR BLOOD DRAW**

### **10.6.1      GENERALLY**

The standard for obtaining a warrant to forcibly draw blood from a DUI suspect is identical to that required for obtaining any other search warrant. Pursuant to the Utah Code of Criminal Procedure, in order to obtain a warrant, an officer must have probable cause that the person or place to be searched contains evidence of a crime.

The statutes read, in relevant part:

77-23-202. Grounds for issuance.

Property or evidence may be seized pursuant to a search warrant if there is probable cause to believe it:

- (1) was unlawfully acquired or is unlawfully possessed;
- (2) has been used or is possessed for the purpose of being used to commit or conceal the commission of an offense; or
- (3) is evidence of illegal conduct.

77-23-203. Conditions precedent to issuance.

(1) A search warrant shall not issue except upon probable cause supported by oath or affirmation particularly describing the person or place to be searched and the person, property, or evidence to be seized.

(2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is a party to the alleged illegal conduct, no search warrant shall issue except upon a finding by the magistrate that the evidence sought to be seized cannot be obtained by subpoena, or that such evidence would be

concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct upon the warrant such conditions that reasonably afford protection of the following interests of the person or entity in possession of such evidence:

- (a) protection against unreasonable interference with normal business;
- (b) protection against the loss or disclosure of protected confidential sources of information; or
- (c) protection against prior or direct restraints on constitutionally protected rights.

In short, in the event of a refusal to submit to chemical tests; where the officer believes that a blood draw will show evidence of impairment or the presence of illegal drugs, it is necessary to obtain a search warrant.

### **10.6.2     STATE V. RODRIGUEZ**

There has historically been the understanding in Utah that the evanescent quality of blood (i.e. it dissipates quickly from the blood stream) created an exigent circumstance and thereby an exception to the warrant requirement. The Utah Supreme Court recently disagreed with this argument in the case of *State v. Rodriguez*, No. 20040566 (January 30, 2007).

In *Rodriguez*, Defendant Heather Rodriguez was driving with passenger Terry Stewart when she abruptly turned into the path of an oncoming bus. Both women were immediately transported to hospitals, and Stewart died soon after. When officers arrived on the scene, they were told by paramedics that the women smelled of alcohol. They also found a half-empty bottle of vodka in Rodriguez's purse.

An officer on the scene ordered a blood draw of Rodriguez at the hospital, which revealed Rodriguez's blood-alcohol level to be nearly five times the legal limit. Rodriguez was charged with automobile homicide, and went to trial. The district court denied Rodriguez's motion to suppress blood-alcohol evidence; the court of appeals reversed. The Utah Supreme Court granted certiorari, holding that they could not determine that "the consequences of alcohol dissipation are so great and the prospects for prompt warrant acquisition so remote that per se exigent circumstance status be awarded to seizures of blood for the purpose of gathering blood-alcohol evidence." Accordingly, the Court declined to grant exigent

circumstance status to the warrantless seizure of blood evidence. However, the Court did find that in this case, the State met its burden of showing that under the totality of the circumstances, “both probable cause and exigent circumstances” warranted the blood draw of Rodriguez. The judgment of the court of appeals was reversed. In making their decision, the court stated as follows:

[I]t is difficult for us to imagine that the United States Supreme Court could muster the assurance that the consequences of alcohol dissipation are so great and the prospects for prompt warrant acquisition so remote that per se exigent circumstance status be awarded to seizures of blood for the purpose of gathering blood-alcohol evidence.

Accordingly, we decline to grant per se exigent circumstance status to warrantless seizures of blood evidence.

Consequently, it is now clear that in order to obtain a blood draw from an uncooperative suspect, police officers must obtain a warrant.

### 10.6.3 SAMPLE WARRANT AFFIDAVIT

A sample affidavit, warrant, and return are included for your use and review:

IN THE \_\_\_\_\_ JUSTICE COURT  
IN AND FOR \_\_\_\_\_ COUNTY  
STATE OF UTAH

#### AFFIDAVIT IN SUPPORT OF BLOOD DRAW SEARCH WARRANT

Officer \_\_\_\_\_ of the \_\_\_\_\_ Police Department, being duly sworn, deposes and says that s/he has reason to believe that:

On the person of \_\_\_\_\_  
(D.O.B.) \_\_\_\_\_

In the City of \_\_\_\_\_, \_\_\_\_\_ County, State of Utah, there is now certain property or evidence described as:

BLOOD EVIDENCE CONTAINING BLOOD ALCOHOL CONCENTRATION OR A MEASURABLE AMOUNT OF A CONTROLLED SUBSTANCE OR METABOLITE OF A CONTROLLED SUBSTANCE IN THE ABOVE-NAMED SUSPECT'S BODY.

And that said evidence constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.

Your affiant believes the blood evidence described is evidence of the crime(s) of:

- ☐ Driving While Intoxicated in violation of U.C.A. § 41-6a-502 or a local ordinance similar thereto.
- ☐ Driving With Any Measurable Controlled Substance in the Body in violation of U.C.A. § 41-6a-517
- ☐ Automobile Homicide in violation of U.C.A. § 76-5-207.
- ☐ An alcohol offense while under 21 years of age in violation of § 32A-12-209.
- ☐ \_\_\_\_\_ in violation of U.C.A. § \_\_\_\_\_

The facts to establish the grounds for issuance of a search warrant are as follows:

Your affiant hereby swears that s/he is an officer duly employed by the \_\_\_\_\_ Police Department who has been employed in law enforcement since \_\_\_\_\_. Your officer further swears that he has been certified by Utah Police Officer Standards and Training. Your affiant has successfully completed the following Police Officer Standard's and Training courses:

- ☐ Standardized Field Sobriety Tests
- ☐ Recognition of odor and characteristics of alcohol and drugs
- ☐ Recognition of physiological symptoms of alcohol and drug consumption

[ ] Drug Recognition Expert

[ ] Accident reconstruction

Your affiant's current assignment

is: \_\_\_\_\_

Furthermore, your affiant states that s/he has observed and performed field sobriety tests upon numerous suspected violators who have consumed alcohol during his/her tenure in law enforcement.

Your affiant further states that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ s/he has observed or was informed by citizen witnesses of the following: (If information is based upon witness observation, state the name of the witness.)

1. Actual physical control of a motor vehicle: (Time of initial observation \_\_\_\_\_ am/pm)

\_\_\_\_\_

\_\_\_\_\_

2. Driving Pattern and/or reason for law enforcement contact: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. Physical Characteristics of the subject which lead your affiant to believe the subject is intoxicated or under the influence of drugs: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

4. Field Sobriety Tests: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

5. Other observations and notes: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Your affiant hereby further states that he was read verbatim the admonition contained in Section X of the Uniform DUI Report Form stating that the suspect was under arrest for the above-listed charge and requesting a chemical test to determine the alcohol and/or drug content of his/her body. Furthermore, the subject of this warrant was warned that his/her "driving privilege may be revoked for 18 months for a first refusal or 24 months for s subsequent refusal with no provision for limited driving." After this warning was read the defendant refused to take the requested test.

7. Your affiant has received further information from the following sources: (Give the name of the source and a description of the information)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

WHEREFORE, your affiant prays that a Search warrant be issued for the seizure of said items at any time day or night, because there is reason to believe it is necessary to seize said blood prior to it being destroyed, damaged, or altered to wit: Based upon my training and experience, evidence contained in the blood dissipates rapidly and will be lost. Time is of the essence to establish the level of the alcohol and/or drugs in the blood.

\_\_\_\_\_  
Affiant

\_\_\_\_\_  
Police Department

SUBSCRIBED AND SWORN TO BEFORE ME

☐ By telephone (the conversation must be recorded and transcribed. After transcription, the statement shall be certified by the magistrate and filed with the court pursuant to U.C.A. § 77-23-204)

☐ In person

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Magistrate

(Only sign if in person)

In the \_\_\_\_\_ Court

Salt Lake County

State of Utah

IN THE \_\_\_\_\_ JUSTICE COURT  
IN AND FOR \_\_\_\_\_ COUNTY  
STATE OF UTAH

SEARCH WARRANT

To any peace officer in the State of Utah:

Proof by Affidavit under oath having been made this day before me either in person or by telephone by \_\_\_\_\_, I am satisfied that there is probable cause to believe that on the person of \_\_\_\_\_ (D.O.B.) \_\_\_\_\_ there is now certain evidence described as:

**BLOOD EVIDENCE CONTAINING BLOOD ALCOHOL CONCENTRATION OR A MEASURABLE AMOUNT OF A CONTROLLED SUBSTANCE OR METABOLITE OF A CONTROLLED SUBSTANCE IN THE ABOVE-NAMED SUSPECT'S BODY.**

And that said evidence constitutes evidence of illegal conduct possessed by a party to the illegal conduct.

You are therefore commanded to make a search of the above-named person for the herein-above described evidence and if you find the same or any part thereof to be responsible for the safekeeping and maintenance of said evidence until the court otherwise orders.

You are further ordered that, if necessary, reasonable force may be used to secure the above-described evidence.

GIVEN UNDER MY HAND and dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Magistrate  
(If telephonic, officer must sign for the Magistrate)  
In the \_\_\_\_\_ Court  
Salt Lake County  
State of Utah

Officer to leave this section unsigned, to be filled in by the magistrate.

(Pursuant to U.C.A. § 77-23-204, the duplicate original was signed at \_\_\_\_\_ a.m./p.m. on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_. \_\_\_\_\_ Magistrate's initials.)

If this is a telephonic warrant the contents of the warrant shall be read verbatim to the magistrate. The magistrate may direct that specific modifications be made in the warrant. **UPON APPROVAL, THE MAGISTRATE SHALL DIRECT THE PEACE OFFICER OR THE PROSECUTING ATTORNEY FOR THE GOVERNMENT WHO IS REQUESTING THE WARRANT TO SIGN THE MAGISTRATE'S NAME ON THE WARRANT** pursuant to U.C.A. § 77-23-204. The warrant signed by the peace officer or prosecuting attorney shall be deemed a warrant, and an unsigned copy shall be filed the next court day with the magistrate. **UPON RETURN OF A TELEPHONIC WARRANT, THE MAGISTRATE SHALL REQUIRE THE PERSON WHO GAVE THE SWORN ORAL TESTIMONY ESTABLISHING THE GROUNDS FOR THE ISSUANCE OF THE WARRANT SIGN A COPY OF THE TRANSCRIPT.**



IN THE \_\_\_\_\_ JUSTICE COURT  
IN AND FOR \_\_\_\_\_ COUNTY  
STATE OF UTAH

DUPLICATE ORIGINAL SEARCH WARRANT

To any peace officer in the State of Utah:

Proof by Affidavit under oath having been made this day before me either in person or by telephone by \_\_\_\_\_, I am satisfied that there is probable cause to believe that on the person of \_\_\_\_\_ (D.O.B.) \_\_\_\_\_ there is now certain evidence described as:

BLOOD EVIDENCE CONTAINING BLOOD ALCOHOL CONCENTRATION OR A MEASURABLE AMOUNT OF A CONTROLLED SUBSTANCE OR METABOLITE OF A CONTROLLED SUBSTANCE IN THE ABOVE-NAMED SUSPECT'S BODY.

And that said evidence constitutes evidence of illegal conduct possessed by a party to the illegal conduct.

You are therefore commanded to make a search of the above-named person for the herein-above described evidence and if you find the same or any part thereof to be responsible for the safekeeping and maintenance of said evidence until the court otherwise orders.

You are further ordered that, if necessary, reasonable force may be used to secure the above-described evidence.

GIVEN UNDER MY HAND and dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Magistrate  
In the \_\_\_\_\_ Court  
\_\_\_\_\_ County  
State of Utah

RETURN TO SEARCH WARRANT

As the affiant sworn in this affidavit, I do swear that I obtained blood evidence from \_\_\_\_\_ (D.O.B. \_\_\_\_\_) on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. Said blood evidence has been submitted to the Utah State Crime Lab for analysis, where I am informed that it will be maintained until further order of the court.

\_\_\_\_\_  
Affiant  
\_\_\_\_\_ Police Department

SUBSCRIBED AND SWORN TO BEFORE ME this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Magistrate  
In the \_\_\_\_\_ Court  
\_\_\_\_\_ County  
State of Utah

## 10.7 ADMISSION OF BREATH TESTS

### 10.7.1 GENERALLY

Utah Code Ann. §41-6a-516 provides the following relating to the admissibility of breath and other chemical tests:

**41-6a-516. Admissibility of chemical test results in actions for driving under the influence - Weight of evidence.**

(1) (a) In any civil or criminal action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or drugs or with a blood or breath alcohol content statutorily prohibited, the results of a chemical test or tests as authorized in Section 41-6a-520 are admissible as evidence.

(b) (i) In a criminal proceeding, noncompliance with Section 41-6a-520 does not render the results of a chemical test inadmissible.

(ii) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(2) This section does not prevent a court from receiving otherwise admissible evidence as to a defendant's blood or breath alcohol level or drug level at the time relevant to the alleged offense.

The Utah Supreme Court considered the evidentiary effect of section 41-6-44.3 in *Murray City v. Hall*, 663 P.2d 1314 (Utah 1983). In *Hall*, defendant challenged the admissibility of a breath test, the foundation for which was based on affidavits concerning the breathalyzer's proper maintenance and functioning. *Id.* at 1319-20. According to the Court, section 41-6-44.3 was intended "to relieve the State of Utah and other governmental entities of the financial burden of calling as a witness in every DUI case the public officer responsible for testing the accuracy of the breathalyzer {861 P.2d 446} equipment." *Id.* Accordingly, the Court held that "so long as there is Compliance with the mandates of the statute, namely, contemporaneous preparation in accordance with established standards, in the regular course of the officer's duties, and indications of trustworthiness, the affidavits regarding the maintenance of a breathalyzer

machine are admissible." *Id.* at 1321. In addition, the Court noted that such "affidavits establish a rebuttable presumption that the breathalyzer machine was functioning properly.

The *Hall* decision has been repeated analyzed and affirmed by both the Court of Appeals and the Supreme Court. See *State v. Garcia*, 965 P.2d 508 (Utah Ct. App. 1998); *Bountiful City v. Maestas*, 788 P.2d 1062 (Utah Ct. App. 1990); *Salt Lake City v. Emerson*, 861 P.2d 443 (Utah Ct. App. 1990); *Triplett v. Schwendiman*, 754 P.2d 87 (Utah Ct. App. 1998); *Layton City v. Watson*, 733 P.2d 499 (Utah 1987).

## 10.7.2 PROCEDURES

The procedures for certifying a breath-testing instrument for use in court proceedings is contained in **Utah Admin. R714-500-4. Instrument Certification.**

In order for a court to accept the intoxilizer results, the prosecutor should admit the following:

- Affidavits from the UHP testing technician showing the machine was functioning properly. These tests are done monthly and it is recommended that the affidavits from immediately before and after the date of the offense be admitted at trial;
- The officer's Intoxilizer checklist;
- The print-out from the Intoxilizer which will show that the machine passed its internal tests as well as the BAC result.

Notes to decisions relating to Intoxilizer results:

### **Evidence.**

Rules requiring a written checklist and test record cards for administration of breathalyzer exams did not require that the checklist and test record card be retained even if the test is later sought to be admitted into evidence. However, if the officer fails to retain all of the test record cards and the checklist, the statutory presumption of validity and admissibility

under § 41-6-44.3 cannot be established without additional testimony or other evidence. (Former R735-500-6.) *Salt Lake City v. Emerson*, 861 P.2d 443 (Utah Ct. App. 1993).

### **Instrument certification.**

In a prosecution for driving under the influence of alcohol, the affidavit required to demonstrate compliance with state standards (§ 41-6-44.3) for chemical breath analysis was not inaccurate, even though the police officer making the arrest tested the intoxilyzer machine and checked a box on his affidavit indicating that the machine was equipped with a fixed absorption calibrator when the machine was not equipped with such a device. The purpose underlying the state testing requirements was to guarantee that breath testing equipment functioned properly and rendered accurate results. Where the affidavit indicated that the intoxilyzer functioned properly, in the absence of evidence disclosing a defect, a "yes" check as to the calibrator did not render the test results inaccurate. (Former R735-500-4.) *Bountiful City v. Maestas*, 788 P.2d 1062 (Utah Ct. App. 1990).

### **Testing instruments.**

The rules require a breath testing instrument to be checked for proper calibration on a routine basis, not to exceed forty days, and as long as these requirements are met, the breathalyzer test is presumed valid. The bookending principle, which required the testing instrument to work properly both before and after the contested test, has been rejected. (Former R735-500-3.) *State v. Vigil*, 772 P.2d 469 (Utah Ct. App. 1989).